STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GENE STANLEY WEST,

Defendant-Appellant.

UNPUBLISHED
May 15, 1998

No. 195005
Kalamazoo Circuit Court
LC No. 95-000530 FC

Before: Sawyer, P.J., and Kelly and Smolenski, JJ.

PER CURIAM.

Defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and one count of extortion, MCL 750.213; MSA 28.410. Defendant was sentenced to concurrent terms of thirty to sixty years' imprisonment for the criminal sexual conduct convictions and five to twenty years' imprisonment for the extortion conviction. Defendant appeals as of right. We affirm.

Defendant's convictions arise out of his sexual abuse of and threats to the victim, defendant's step-daughter.

I

We first address the issues raised in the brief filed on defendant's behalf by his appellate counsel.

A

Defendant first raises two grounds in support of his argument that he was denied the effective assistance of trial counsel. We note that defendant moved for a new trial on this ground below. Following an evidentiary hearing, the trial court found that defendant was not denied the effective assistance of trial counsel.

Specifically, defendant first contends that trial counsel was ineffective in failing to file a proper motion asserting that the array from which his jury was selected was not drawn from a fair cross-section of the community. We disagree. The record specifically indicates that trial counsel timely raised a fair-cross-section challenge to the jury array before the jury was impaneled and sworn. *People v Hubbard (After Remand)*, 217 Mich App 459, 464-465; 552 NW2d 493 (1996).

Moreover, we note that in order to establish a prima facie violation of the fair-cross-section requirement, the defendant must establish three factors, the first of which is that the group alleged to be excluded from the jury venire is a distinctive group in the community. *Hubbard, supra* at 473. African Americans are considered a constitutionally cognizable group for Sixth Amendment fair-cross-section purposes. *Id*. At the evidentiary hearing in this case, defendant did not complain that African-Americans had been excluded from the jury array. Rather, defendant's complaint at the evidentiary hearing was that his "peers" had been improperly excluded from the jury array, which defendant defined as "peoples of my age, my upbringing, my surroundings, north side, City of Kalamazoo, not Gobles or Otsego or Vicksburg; with the City of Kalamazoo." Defendant has failed to cite any authority indicating the defendant's "peers," as defined by defendant, constitute a constitutionally cognizable group for Sixth Amendment fair-cross-section purposes. A defendant's counsel has no obligation to file futile objections. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997). Accordingly, even assuming that counsel had failed to bring a fair-cross-section challenge, we conclude that such failure could not constitute ineffective assistance of counsel in this case where defendant would be unable to establish a prima facie violation of the fair-cross-section requirement. *Id*.

Defendant also asserts that counsel erred in failing to call as witnesses certain children living in his home who would have allegedly contradicted the victim's testimony. A failure to call witnesses constitutes ineffective assistance of counsel only if the failure deprives the defendant of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). A substantial defense is one which might have made a difference in the outcome of the trial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Our review of the record in this case reveals that defendant has failed, either below or on appeal, to establish that the testimony of the child witnesses would have provided defendant with a substantial defense. Thus, defendant has also failed to establish that he was denied the effective assistance of counsel on this ground.

B

Next, defendant raises an issue with respect to a juror. During jury selection in this case, a juror indicated that he thought he knew defendant from high school but that this knowledge would not lead him to be for or against defendant. The juror was subsequently sworn in as a member of the jury. On the second day of trial, and after the victim's father had testified, the same juror informed the court that he had also gone to school with the victim's father and that he knew the victim's father better than defendant. The juror stated that he could still be fair and impartial in defendant's case. Defense counsel noted that he could not articulate a challenge for cause but stated that he was now in a position where he could not exercise a peremptory challenge to excuse the juror. The trial court ruled that the juror would not be excused.

Defendant now argues that the trial court abused its discretion in refusing to remove the juror.

This Court recently addressed this precise factual situation. In *People v Daoust*, ___ Mich App ___; ___ NW2d ___ (Docket No. 188192, issued 2/10/98), slip op p 2, a juror informed the court on the second day of trial, and after the victim's mother had testified, that he may have gone to school with the victim's mother. The juror assured the trial court that he could put aside his perceptions in reaching a verdict. *Id*. Defense counsel conceded that there were no circumstances justifying a discharge for cause, but contended that he would have exercised a peremptory challenge to remove the juror if he had known the information during voir dire. *Id*. The trial court denied the defendant's request to remove the juror. On appeal, the defendant challenged the trial court's ruling.

This Court found no error on this issue. *Id*. at 3. This Court held as follows:

> [W]hen information potentially affecting a juror's ability to act impartially is discovered after the jury is sworn, the defendant is entitled to relief only if he can establish (1) that he was actually prejudiced by the presence of the juror in question or (2) that the juror was properly excusable for cause. [*Id*.]

In this case, defense counsel conceded below that there was no basis to challenge the juror for cause. On appeal, defendant claims that the juror had formed an opinion on defendant's guilt. However, the record belies this assertion by defendant. Accordingly, we conclude that the trial court did not err in refusing to remove the juror where defendant has failed to establish actual prejudice or grounds for a removal for cause.

C

Finally, defendant contends that the trial court abused its discretion in admitting the testimony of Mary Bombich, who was qualified as an expert in the assessment and treatment of sexually abused children. We disagree. Because Bombich's testimony complied with the requirements stated in *People v Peterson*, 450 Mich 349; 537 NW2d 857 (1995), amended 450 Mich 1212 (1995), we find no abuse of discretion.

II

Next, we address the issues raised in the supplemental brief filed by defendant pro se.

A

Defendant pro se first raises an argument premised on the victim's testimony at the May, 1995, preliminary examination. Specifically, the victim testified that in Spring, 1991, the defendant sexually assaulted her and that the next day she, her mother and her brother went to the YWCA shelter where the victim remained for five weeks. Defendant contends on appeal that the fact that the victim never said anything about his sexual assaults during her five-week stay at the shelter or the four years between her stay at the shelter and the preliminary examination is a miscarriage of justice. The function of preliminary examination is simply to determine whether probable cause exists to hold the accused for

trial. Defendant makes no argument that he was not properly bound over for trial. The fact that the victim waited so long before making any accusations against defendant may or may not have affected her credibility. However, defendant had ample opportunity to test the victim's credibility at trial. Thus, we are unable to give defendant any relief on this issue

B

Next, defendant pro se argues that he was denied a fair trial where the trial court failed to require the prosecutor to produce twenty-seven listed witnesses. However, these twenty-seven witnesses were simply listed on the prosecutor's list of known witnesses. The prosecutor thereafter filed a list of the witnesses that the prosecutor intended to call at trial. The six witnesses on this list all testified at trial. Accordingly, we find no error. See *People v Burwick*, 450 Mich 281; 537 NW2d 813 (1995).

C

Next, defendant appears to argue that a police officer lied under oath. Specifically, the officer testified that she became involved in this case in March, 1996, pursuant to a contact by the Department of Social Services (DSS). Defendant attempts to argue that this testimony is untrue because, as characterized by defendant, Mr. Henry from the DSS had earlier stated to the trial court that there was "no indication of a previous referral . . . ." However, defendant takes Mr. Henry's statement out of context. Mr. Henry's complete statement indicates that other than the February and March, 1996, record of the allegations in this case, there was no record of a previous referral or investigation. Accordingly, we find no error.

D

Next, defendant pro se contends that the trial court erred in admitting the hearsay testimony of the victim's mother and father regarding out-of-court statements made by the victim. Defendant did not identify the precise testimony complained of, and review of the record reveals that the victim's mother did not recount the victim's out-of-court statements concerning the allegations against defendant. However, the victim's father did testify that the victim told him that defendant was "molesting her." We agree that this testimony was inadmissible hearsay. *People v Fenner*, 136 Mich App 45, 48-49; 356 NW2d 1 (1984). However, the victim's father did not recount details of the molestation and gave no further testimony regarding the victim's out-of-court statements. Under these circumstances, we conclude that the erroneous admission of the hearsay testimony was harmless error. *People v Rodriquez (On Remand)*, 216 Mich App 329, 332; 549 NW2d 359 (1996).

E

Last, defendant notes that the most severe sentence he could receive for a conviction of first-degree criminal sexual conduct was life in prison. Defendant contends that, therefore, his thirty to sixty year sentences constituted an abuse of discretion because these sentences were more than a life sentence. We disagree. With respect to his first-degree criminal sexual conduct convictions, defendant

was subject to a sentence of life or any term of years. MCL 750.520b(2); MSA 28.788(2)(2). Defendant's thirty to sixty year sentences fell within the permissible range of sentences for defendant's convicted of first-degree criminal sexual conduct and were indeterminate. *People v Lemons*, 454 Mich 234, 258; 562 NW2d 447 (1997). Further, where defendant had a previous conviction for first-degree criminal sexual conduct with respect to his own then seven-year-old daughter, we conclude that defendant's sentences are proportional. *Id*. at 260. Accordingly, we conclude that defendant's sentences were not excessive. *Id*.

Affirmed.

/s/ David H. Sawyer
/s/ Michael J. Kelly
/s/ Michael R. Smolenski